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O'Brien v. O'Brien[1] was a radical decision, with the potential for enormous impact in many people's lives. Yet it was rendered by the high court of a state that had been among the most conservative in the nation within the domain of marital property law. Its holding had been urged as a necessary breakthrough to make the law of divorce fair and protect the financial security of married women generally. Yet the mounting number of cases from other states rejecting its position were a great disappointment to its proponents.[2] To appreciate the decision's perceived promise, and the reasons for its widespread rejection

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1. O'Brien v. O'Brien, 452 N.Y.S.2d 801 (Sup. Ct. 1982).

2. It was said, for example, that to exclude earning capacity from the marital estate "makes a mockery of the equal division rule." LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 388 (1985). Once *O'Brien* was decided, it was compared favorably with the contrasting Colorado decision in *Marriage of Graham*. *E.g.*, Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/other Spouse" Divorces*, 63 N.Y.U.L. Rev. 751 (1988). Later commentary focused more broadly on perceived defects in divorce law, but highlighted the failure of other states to follow *O'Brien* as a major defect. *E.g.*, ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 7 (1992) ("[F]ailure to incorporate the effects of marriage on the human capital of the spouses . . . in any systematic way is a major cause for divorced women suffering a substantial reduction in their welfare."); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 200 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) ("An approach that ignores future earning capacity in defining marital resources will reinforce gender disparities."); Joan C. Williams, *Women and Property*, *in* A PROPERTY ANTHOLOGY 258-59 (Richard H. Chused 2d ed. 1997) (arguing that exclusion of human capital from property plays a role in impoverishment of women). Remarkably, the arguments for this position continue to be made. *See, e.g.*, Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 107 (2004) (including earning capacity within the definition of marital property is necessary to achieve egalitarian marriage).

and its proponents' disappointment, one must first understand the legal context within which the decision arose.

A. The legal setting of O'Brien.

American marital property law changed during the 1960s and 1970s. Before then, most states made title the single most important factor in allocating property between divorcing spouses. A husband retained sole ownership in his earnings during marriage and in any property purchased in his name. The same would be true for the wife, but few wives then earned very much. A husband might make a gift of some assets to his wife, by putting them in joint title. But nothing, apart from social pressures, required such transfers. The usual result then, under the traditional common law rules, was a large disparity in wealth between divorcing husbands and wives.

In principle, that disparity might be reduced by an award of alimony requiring a husband to make weekly or monthly support payments to his former wife. But such awards to wives were largely within the discretion of the trial judge. Some received generous awards; others did not. Many received less than had been ordered, because cost-effective enforcement tools were not available. So overall, the alimony system did not provide divorced wives a satisfactory substitute for a property share. During the mid-20th century, common law states began to soften the traditional English property rules. A common law court of equity could always look beyond formal title to real beneficial ownership, when the two diverged. Some divorce courts would rely on this power to aid the wife who had contributed her labor or earnings to the acquisition of property on the understanding it would be jointly owned, even if her husband alone held formal title. But such adjustments offered little to the typical wife of this era who made few direct financial contributions to the couple's accumulated property. Over time, however, some common law courts extended this traditional equitable authority to recognize the wife's domestic contributions as well as her financial contributions to the property's acquisition.[3] These states planted the seed upon which later reforms were built.

3. HOMER CLARK, LAW OF DOMESTIC RELATIONS 450-51 (1968).

As divorce rates began to climb in the mid 1960s, the importance of economic injustice at divorce became more salient. Reform of marital property laws seemed more promising than breathing life into alimony. Property claims assert ownership and entitlement, while alimony claims feel like pleas for charity. Property claims were also more reliable because they were final judgments, enforceable (like any other civil judgment) by attachment and seizure if necessary. Some states had already used equitable remedies to soften the English rules, providing plausibility to reform efforts in other states. Reformers had a ready model to point to—the community property system that prevailed in Louisiana and seven western and southwestern states (including California and Texas), which traced their marital property laws to continental roots. Community property treats everything earned by either spouse during marriage as their joint property regardless of the title in which it is held. Reformers hoped for analogous rules in the common law states that would entitle both spouses to share at divorce in property acquired during their marriage, without regard to title. By focusing on property earned during marriage, rather than property a spouse brought into the marriage or inherited, reformers borrowed the community property classification rules even thought they avoided the label "community property" in favor of "marital property."

The community property classification rules are important because the more well-defined and narrow the class of property subject to equitable reallocation, the more specific can be the allocation rules. The equal allocation of community property would not make sense to most people if the pot included property a spouse inherited, or owned before the marriage. Such "separate property" is normally confirmed to its owner in community property states. The question was whether the common law states would move to a similar system, with well-defined and comprehensive rules for characterizing property as marital or separate, or would instead leave such classifications vague, put all property in the pot and rely on trial courts' equitable discretion to allocate it reasonably. Looking back today on what happened, one observes a shift over time toward clear classification rules combined with a presumption that marital property is

divided equally. That movement has gone further, and taken less time, in some states than in others.

Looking forward from the 1970s, one might have expected New York to move more slowly than most. New York did not adopt equitable distribution until 1980, by which time it was one of only three remaining common law title states.[4] Moreover, up to the very moment of New York's delayed legislative reform, its courts were among the most faithful in the nation in adhering to the technical strictures of the common law system. They rejected to the very end the flexible equitable doctrines accepted by other common law courts. In one famous example[5] husband and wife had jointly decided to invest the husband's entire salary while living exclusively on the wife's earnings. The investments were titled in the husband's name, and he claimed them all at their divorce fifteen years later.[6] The wife, claiming half their value, pointed out that her husband was only able to invest his income because she had supported the family—his duty under the New York law that then prevailed.[7] But the New York court gave her nothing because she could not show an explicit promise by the husband to hold half the investments in trust for her, commenting that she "really seeks . . . a community property division under the guise of equitable relief."[8]

Reformers who had been trying for years to change New York law got their chance in 1979 when the United States Supreme Court decided *Orr v. Orr*.[9] *Orr* held that Alabama violated the Equal Protection Clause by allowing wives but not husbands to qualify for alimony by showing need.[10] Because compliance with *Orr* required New York to amend its divorce law to make it gender-neutral, the Judiciary Committee of the New York State Senate, which had for the past three years held up all reform bills, now had no choice but to report out divorce

4. 1980 N.Y. Laws 281, amending N.Y. DOM.REL.LAW § 236. The other two laggards were Virginia and West Virginia. *See* Brian Diamond & William A. Prinsell, Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 Brook. L. Rev. 67, 67-68 nn. 1-2 (1980). Both these states soon followed.

5. Fisher v. Wirth, 326 N.Y.S.2d 308 (App. Div. 1971).

6. *Id.* at 310.

7. *Id.*

8. *Id.*

9. Orr v. Orr, 440 U.S. 268 (1979).

10. *Id.* at 283.

reform legislation.[11] Seven members of the state senate jointly introduced a bill to comply with *Orr*, but the legislative memorandum explained that it would also "establish a new concept of support and distribution of property by implementation of the terms 'maintenance,' 'distributive award,' and 'marital property.'"[12] The bill was passed on June 19, 1980, and signed by the Governor three days later on June 22.[13]

In the 30-day period between final passage and the effective date of July 19, many spouses raced to commence divorce actions to avoid their property's distribution under the new law. The local legal newspaper reported a "land-office business" for process servers and private detectives seeking to serve summonses on non-titled spouses, many of whom, it was said, had chosen that particular 30-day period to take out of state vacations.[14]

Although Michael and Loretta O'Brien had separated in April of 1980, Michael was not among those urgently seeking to file for divorce before July 19. Having been a student for the past four years, he had education loans to repay but little tangible property, and little reason to think he had any personal stake in the legal changes governing the allocation of property at divorce. When Michael left their New York apartment in April, he took only a duffel bag of clothes, his grandfather's rocking chair, his four guitars and a stereo, leaving the rest of their modest property for Loretta.[15] Soon after, Michael took the examination for his New York medical license. Having received no notice of the results, he called Albany in November of 1980, and learned his license had been issued in October. Notice had been sent to his old apartment, where Loretta still

11. *See* HENRY H. FOSTER, JR., A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW 41-45 (1980).

12. NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION, A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW, 597–606 (Henry H. Foster, Jr. ed., Law & Business, Inc., Harcourt Brace Jovanovich 1980).

13. N.Y. DOM.REL.LAW § 236.

14. Myrna Felder, *Courts, Legislature Struggle to Answer Property Questions*, N.Y.L.J., July 19, 1990, at 1.

15. David Margolick, *Key Ruling Due on Ex-Wife Seeking A Share of Medical License's Value*, N.Y. TIMES, Dec. 25, 1985, § 1, at 34.

lived, and so she had known he had his medical license long before he did.[16] She would soon claim partial ownership in it.

Michael O'Brien, M.D., finally filed for divorce in December of 1980. His delay came back to haunt him.

B. The O'Briens' Story[17]

Michael O'Brien was born in 1947 and grew up in the Bronx. His father, Eugene O'Brien, was a bank president. Michael attended several New York area colleges but withdrew 35 units short of his B.A. degree in English. He worked for a year as an aide in the psychiatry department of the Albert Einstein College of Medicine in New York, then joined the Army Reserve when his student draft deferment ran out. He returned to New York in 1969 after completing his six month reserve duty. Then 22 years old, he sold shoes at Gimbel's department store and took occasional night classes.[18] Loretta Verzillo also sold shoes at Gimbel's.[19] She had grown up in Yonkers, a community just north of the Bronx, where her father was an accountant. She had earned a B.A. at the State University of New York at New Palz in 1967. She was 24 when she met Michael at Gimbel's. Their conversation soon went beyond shoes. They were married in April 1971.[20]

Michael's 1980 complaint for divorce was drawn up by Vincent Nesci, then a "local boy" (Michael's words) in Yonkers. Divorce work was a sideline for Nesci, who had graduated from St. Johns Law School nine years before, and he eventually gave it up.[21] The complaint he filed for Michael alleged that Loretta was guilty of cruel and inhuman treatment and constructive abandonment.[22] Loretta' counterclaimed for divorce on the ground of Michael's cruelty. In most American states neither claim would be necessary, but both then and today, New York,

16. Telephone interview with Michael O'Brien, (Feb. 25, 2006) [hereinafter *Interview*].

17. Loretta died on November 5, 2002, before research on this chapter began.

18. *See* Margolick, *supra* note 15, at 34.

19. *Id.*

20. O'Brien v. O'Brien, 452 N.Y.S.2d 801, 802 (Sup. Ct. 1982).

21. Today Nesci is the managing partner of Nesci, Keane, Piekarski, Keogh & Corrigan, a White Plains, New York firm specializing in the defense of tort claims, labor relations, and environmental law.

22. *O'Brien*, 452 N.Y.S.2d at 802.

alone among American states, refuses to allow divorce by mutual consent. Couples who wish to end their marriage without claims of fault must first obtain a legal separation, and then live apart, pursuant to its terms, for at least a year before they can formally dissolve their marriage. For most divorcing New Yorkers, this delay is unwelcome, as are the additional costs of the required multiple proceedings. So Michael and Loretta, like most divorcing New Yorkers, ultimately stipulated to a fault ground for divorce: Michael withdrew his complaint and offered no defense to Loretta's revised claim for divorce on the ground of abandonment.[23] The court could then terminate their marriage without added delay, although their divorce could not be wrapped up until they also agreed on its financial aspects. But on the financial issues they did not agree: Loretta had financial claims that Michael resisted. To understand those claims, we return to the story of their marriage.

After marrying, Michael and Loretta both taught at St. Peters, a private school. Loretta's salary there was about $8,900, and Michael's about $8,000. He also earned small amounts playing guitar in a band. Michael finished the courses he needed for his B.A. in English in 1972. Around this time he began to think about going to medical school. Loretta believed her family was responsible for Michael's decision. As she explained to a *Times* reporter, when her mother got sick shortly after their marriage, her father "noted offhandedly that he wished there were a doctor in the family, and Michael confessed that was what he had always wanted to be.[24] 'My father said, 'Don't ever let money stop you from anything—if you want to be a doctor, I'll mortgage my house," she recalled."[25] Years later Michael agreed that her father's offer might have "pushed him a little bit," but it was not "the driving force" of his decision.[26] "I went back to school because I wanted to."[27] If Loretta's father had not offered to help him financially, "I would have gotten the money somehow, with other loans or from my parents, if need

23. *Id.*

24. Margolick, *supra* note 15, at 34.

25. *Id.*

26. *Interview*, *supra* note note 16.

27. *Id.*

be."[28] Whatever the impetus, Michael tried a chemistry course and apparently surprised himself by doing well.[29] He then spent a year taking pre-med classes at Hunter College in New York.[30] By September of 1973 he was ready to begin medical school in Guadalajara, Mexico.[31] Classes were in Spanish, which Michael had to learn in an intensive summer course before medical school began.[32] He became fluent, a "gift" he continues to use today with his many Spanish-speaking patients.[33]

Michael and Loretta lived in Guadalajara from September of 1973 to December of 1976. While Michael attended medical school, Loretta taught kindergarten in the mornings and gave English lessons in the afternoon, working 35 to 40 hours a week.[34] Michael had no earnings but took out student loans. During their divorce litigation Loretta told a reporter their life in Mexico "was no picnic," that she had grilled cheese sandwiches for dinner every night for four years.[35] But Michael recalled that the low Mexican cost of living allowed them a better life than in New York. Maid service cost $2 a week, and at trial Loretta agreed that housing and food cost them only $200 a month, about half of what they earned.[36] Nor were they isolated; apart from the city's large number of American medical students, an old friend of Loretta's had married a Mexican citizen and lived nearby. Louis Verzillo, Loretta's father, initially helped Michael with school expenses, but then "got in over his head" with an investment in Boca Raton, and asked Michael's parents if they could help. Embarrassed because they had not known of Louis' help for their son, Michael's parents contributed to his remaining education expenses.[37] While Michael initially found medical school difficult he eventually did well, and was accepted to complete his final two semesters of medical training at Yonkers General Hospital in New York. He received

28. *Id.*
29. *Id.*
30. *Id.*; Margolick, *supra* note 15, at 34.
31. *Interview*, *supra* note 16.
32. *Id.*
33. *Id.*
34. Margolick, *supra* note 15, at 34.
35. *See id.*
36. *See* Transcript of Record at 117, O'Brien v. O'Brien, 452 N.Y.S.2d 801 (Sup. Ct. 1982)
37. *Id.* at 244-45.

his M.D. degree in December of 1977 and entered a residency in internal medicine.

Loretta resumed teaching at St. Peter's when she and Michael returned to New York in January of 1977.[38] She again considered studying for the permanent certificate required to teach in public schools[39] but decided against it. She did not want to spend her $2,000 savings on school: "I had one more year to work and then I was going to retire and he was going to work."[40] Their marriage, however, had apparently been in difficulty for some time. Michael testified at trial that when they left for Mexico in 1973 the state of their marriage was "abysmally poor."[41] He wanted children but they never had sexual relations during the marriage. The trial judge excluded the further evidence Michael offered to show Loretta's refusal to engage in sexual relations. But Michael did testify that their constant fighting "made it difficult for me to concentrate on my work a great deal of the time."[42] After their return to New York he took refuge in working long hours, and was not home that much. He later recalled that arguments aside, he and Loretta had not spoken for months by the time he moved out in April of 1980. Michael thought it should have been obvious to Loretta that their marriage was in great jeopardy, but she was "stunned" when Michael announced his intention to leave. Indeed, even after learning Michael had begun living with Patti Rossini, a nurse whom he had met, she said she told her lawyer that she did not want a divorce.

Michael's resolve, however, had only strengthened. He found in Patti what he had not had with Loretta. Patti was pregnant, and Michael was anxious to marry her and begin a new family life. He was now pursuing a residency in Cleveland, where Patti and their new child would join him. Nesci told Michael that Loretta was avoiding process, but she was finally served on Christmas Day of 1980.[43] Michael, disenchanted with

38. Margolick, *supra* note 15, at 34.
39. Transcript *supra* note 36, at 55.
40. *Id.* at 91.
41. *Id.* at 242.
42. *Id.* at 242-43.
43. *Id.* The record shows process was served on December 25, 1980, and Michael said much was made of this at the trial. *Id.* Inexplicably, Loretta's published account in the Ladies' Home Journal says she was served with the divorce

Nesci, replaced him with Andy Yankwitt, who had represented Patti in her custody dispute with her former husband.

About ten months later, Michael and Andy met with Loretta's lawyer, Albert Emanuelli, at Emanuelli's office in the White Plains Republican Party headquarters. There they learned that Loretta planned to claim that New York's new equitable distribution law gave her a marital property interest in Michael's medical license. The question of whether property claims could be made on degrees and licenses was a subject of active discussion among family law academics at the time.[44] Most courts decided against the claim, but the handful allowing it received wide publicity. One was a New Jersey trial court which had held, less than a year before this White Plains meeting, that a medical degree was property under New Jersey's new equitable distribution law.[45] That decision, *Lynn v. Lynn*, undoubtedly caught the attention of New York area divorce lawyers. The trial court was ultimately reversed, but not until December of 1982, after the *O'Brien* trial had ended, and it is likely that Emanuelli had *Lynn* in mind. He was motivated to look for an unconventional remedy in any event, rather than alimony, now renamed maintenance. That is because, unknown then to Michael or his lawyer, Loretta planned to remarry. That meant that an award of maintenance, even if based on Michael's future income as a physician, would have little value for her because maintenance awards ended automatically when the recipient remarried. But if she could convert Michael's future income into marital property in which she had an ownership interest, her claim would be unaffected by her remarriage.

C. The Trial

The trial began on January 18, 1982, thirteen months after service, before Judge Richard J. Daronco of the Westchester County Supreme Court. It began with the required charade of establishing the fault necessary for an immediate judgment of divorce. Loretta testified that she had always been "a loyal,

papers "at school" in " early January." Loretta O'Brien, *It's Not Easy to Be a Woman Today*, LADIES' HOME JOURNAL, Nov. 1982 at 40.

44. *See* Margolick, *supra* note 15, at 34.

45. Lynn v Lynn, NJ Super Ct, No. M - 9842 - 8, Dec. 5, 1981, *rev'd,* 453 A.2d 539 (N.J. 1982).

faithful and dutiful wife" and that Michael refused to cohabit with her. Yankwitt waived cross-examination and Loretta's claim for divorce was granted. Emanuelli then called Michael who testified he was earning $17,000 a year as a first-year surgical resident at the Fairview Hospital in Cleveland, but might leave this program to take an offer for an internal medicine residency leading to a faculty position at New York Medical College.[46] Loretta testified they both worked full time, with equivalent pay, from the time of their marriage through June of 1972, when Michael finished the night classes he needed to complete the credits for his B.A. degree. They agreed that Loretta controlled their marital finances: Michael gave her all his earnings, including the cash payments he received for playing guitar. Emanuelli had Loretta provide a detailed accounting of their marriage.

Loretta testified she earned $8,400 during the 1972-73 academic year, while Michael attended Hunter College full-time; $11,600 during the next three and a half years in Mexico; and $33,200 during the three and a half years from January 1977, when they returned to New York, through June of 1980, when Michael completed the training needed to obtain his degree and license. In total, then, Loretta testified to earnings of $53,200 during the entire period of Michael's training. Michael later testified on direct examination to earnings of $17,550 over these same years, and to education loans on which he alone was liable of $10,000. So Michael contributed $27,550 to their marriage over the course of his training, $25,650 less than Loretta.[47] Their income went to pay for both their living expenses and costs directly associated with Michael's education. Loretta testified that over the course of these nine years Michael paid $27,500 in tuition: $2,500 a semester for the seven semesters from the fall of 1973 through the end of 1977, and an additional $10,000 during 1978 and 1979. There was also testimony about the contributions of both sets of in-laws. Loretta's father claimed payments of $9,800 toward Michael's tuition, while Michael's mother testified to $10,000 in payments. Despite some gaps and slight inconsistencies in the evidence overall, it

46. *See O'Brien*, 452 N.Y.S.2d at 802.

47. Oddly, Loretta testified that Michael had taken out $15,000 in loans, $5,000 more than Michael himself claimed. Transcript *supra* note 16, at 61-87.

appeared the two sets of in-laws made approximately equal contributions to the direct costs of Michael's education.

The judge and both lawyers assumed Loretta's accounting was important to her claim, yet the connection was not really clear. If Michael's medical license and degree were marital property, then Loretta's entitlement to share in their value could not depend upon her financial contribution to their acquisition. After all, a key purpose of the new marital property system was to protect the spouse whose contributions to the marriage were *not* market labor. Nonetheless, it seemed a good bet that New York, which was among the most reluctant of converts to equitable distribution, might have particular trouble digesting this idea. It would not therefore be surprising if the judge and both attorneys thought Loretta's financial contributions were important to her property claim on Michael's professional credentials. There was also a second possible reason for Loretta's accounting: if her claim for ownership in Michael's degree were rejected, she would want at least a claim for reimbursement of her financial contributions to its acquisition. In fact, as the law developed, such reimbursement is the remedy that states recognize; New York alone rejects it in favor of an ownership interest in the degree. So Loretta's lawyer might have been hedging his bets, laying the foundation for a reimbursement claim in case his more ambitious claim of shared ownership failed.

Central to Loretta's claim was the testimony of her expert, Stanley Goodman, a lawyer and CPA He began by focusing on Loretta's financial contributions to the marriage and divorce, relative to Michael's. His calculation was based on hypothetical figures crediting Loretta with contributions at least $5,000 more than she even claimed. This factual error was compounded by a conceptual one: he credited Loretta with her father's gifts, but did not credit Michael with his parent's gifts, or with the education loans for which Michael alone was liable. But Yankwitt failed to press Goodman on these points, leaving standing his conclusion that over the course of the marriage Loretta contributed $61,500 more than Michael. Goodman then converted this $61,500 figure to a 1982 present value of

$103,930.[48] Judge Daronco accepted this $103,390 figure and it became entrenched in later descriptions of the case, even though it was obtained by applying an incoherent method to incorrect facts.

If the purpose of Goodman's testimony was to help calculate a reimbursement claim, his method also ignored available precedent suggesting the appropriate method. The Minnesota Supreme Court's opinion in *DeLa Rosa v. DeLa Rosa*, decided the year before the *O'Brien* trial, is often cited on this point.[49] It also involved a wife who had supported her husband during medical school.[50] It calculated his educational expenses by adding his school fees to half the couple's living expenses during his education.[51] The shortfall between this total, and his own dollar contributions, is the amount his wife might have covered through her earnings, for which she was allowed reimbursement.[52] One can see this calculation excludes reimbursement for the wife's payments toward *her own* living expenses, as well as other unrelated expenditures (such as family gifts).[53] *De La Rosa* has been widely followed, although some states limit reimbursement to the direct costs of school, excluding the student's spouse's living expenses as well as claimant's, and do not include the student-spouse's living expenses.[54] Goodman's method, followed nowhere, would by contrast have allowed Loretta reimbursement for everything she earned during the marriage, whether it was spent on Michael's education, on her own living expenses, or on Christmas gifts to her family.[55]

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48. . Emanuelli also elicited from Goodman an estimate that the market value of Loretta's housework for Michael, assuming she spent an hour a day at it, was $25 a week, or $1,300 a year. But nothing was ever made of this portion of his testimony.

49. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981). Other state supreme courts which reached essentially the same decision at about the same time include Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982) and Hubbard v. Hubbard, 603 P.2d 747, 750-53 (Okla. 1979).

50. *DeLa Rosa*, 309 N.W.2d at 756.

51. *Id.* at 759.

52. *Id.* at 758-59.

53. *See id.* at 759, n. 9.

54. *E.g.*, Bold v. Bold, 574 A.2d 552 (Pa. 1990); CAL. FAM. CODE § 2641 (West 1994); IND. CODE ANN. § 31-1-11.5-11(d) (Michie Supp. 1996).

55. *See* O'Brien v. O'Brien, 452 N.Y.S.2d 801, 806 (Sup. Ct. 1982).

But Goodman's main purpose was to support Loretta's claim to share the degree's value, rather than to reimbursement. He said Loretta's financial contributions were a reason why she had a property interest in Michael's degree and license. "Mrs. O'Brien is no less a partner in this license than she would have been if nine years ago Dr. O'Brien had opened up a retail store and he now had four retail stores and she worked beside him to get the retail stores."[56] But that view evidenced a fundamental misunderstanding of equitable distribution. The wife who never set foot in Goodman's hypothetical store, but instead spent the entire marriage engaged in domestic tasks, is also a "partner" with a claim to share the value of this retail business. That was the whole point of the equitable distribution reform.[57] That Goodman's confused understanding went unchallenged in the courtroom reflected the primitive state then of both New York law and the thinking of New York domestic relations bar on this subject. They simply had not yet digested the real revolution inherent in equitable distribution: shared ownership of marital property is presumed, and is not dependent on a spouse having made any direct contribution of labor or capital to its acquisition.

Goodman testified to both the legal issue–were Michael's medical credentials marital property?–as well as the factual issue–what were the credentials worth?[58] He grounded his support of Loretta's legal claim in part on her financial contributions, the questionable relevance of which we have just reviewed; but Goodman's second argument was that Michael did not yet have an established practice to value, so that "we are

56. Transcript *supra* note 36, at 27-35.

57. Judge Daronco did correctly say that under the new Domestic Relations Law marital property was meant to include " property . . . attributable to the expenditure or effort by either spouse," *O'Brien,* 452 N.Y.S.2d at 805, which of course means a wife has claims on property acquired entirely through the husband's effort, because it is marital property. Common law states came to understand that the equitable distribution reforms would work very little change if a spouse's claim on marital assets depended upon the extent of her financial contribution to their acquisition. That is why their statutes, either initially or after amendment, include "homemaker" provisions directing courts to credit a wife's domestic contributions. New York has such a provision, N.Y. DOM. REL. § 236(B)(5)(d)(6) (in allocating marital property, the court should consider "services as a spouse, parent, wage earner and homemaker").

58. *Id.* at 805.

forced" (Gooodman's words) to value the degree.[59] But of course, one is "forced" only if one begins the inquiry already committed to finding marital property to value. But that was of course the question before the court. It also seems difficult to argue, as a matter of *property law*, that whether or not the degree is property depends upon whether there is other property around to which Loretta can lay claim. Yankwitt never pressed Goodman to make any such property law argument. One can guess, however, that Goodman's focus was on equity, not property law: if there were other assets the court could give Loretta then there was no need to value the degree, but otherwise there was.

But such an approach assumes the new equitable distribution law did not *change* marital property rules, but *replaced* them with unrestrained and largely undefined judicial discretion to create and alter each parties' financial assets. As it turned out, New York alone, effectively endorsed this radical reading. Other states read their law to give courts equitable authority in *allocating* property; but not in *defining* the property subject to this equitable allocation. This New York difference began with Goodman's opinion.[60] Whether New York would have adopted a different position had Michael offered his own expert to challenge Goodman we cannot know.

Pressed by Yankwitt for legal authority to support his view, Goodman conceded[61] that *Lynn v. Lynn*–the recent New Jersey trial court decision that would later be reversed[62]–was all he had. On redirect Emanuelli, now free to ask Goodman about case law, elicited other citations from him. Although the citations were largely off-point,[63] they interested Judge Daronco,

59. Transcript *supra* note 36, at 25-42.

60. *See O'Brien*, 452 N.Y.S.2d at 806.

61. Transcript *supra* note 36, at 192.

62. Lynn v Lynn, NJ Super Ct, No. M - 9842 - 8, Dec. 5, 1981, *rev'd,* 453 A.2d 539 (N.J. 1982).

63. *E.g.*, Moss v. Moss, 264 N.W.2d 97 (Mich. 1978); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), *rev'd,* 648 S.W.2d 847 (Ky. 1982). Technically, this court accepted the lower court's characterization of the degree as property, but expressed concern about this ruling and held that the employed wife's claim would be limited to the value of her contributions to her student-husband's education. *Inman*, 578 S.W.2d at 270. The case thus did not in fact support Loretta's claim for a share in the value of Michael's future earnings. *See id.* Just months after the *O'Brien* trial, the same court held clearly that a degree was not property, when the

who asked questions himself.[64] It seems likely Yankwitt hurt Michael's case by opening this line of questioning, giving Goodman's legal views more credibility than was justified by the precedents he cited.

Yankwitt's failure to present their own expert also left him unable to counter Goodman's valuation of Michael's license and degree, the most important portion of Goodman's testimony. That valuation was based upon Goodman's projections of Michael's future earnings.[65] Assuming he would finish his surgery residency in 1985, Goodman projected Michael's total income as a surgeon over a 27-year career from 1985 to 2012, when Michael would turn 65.[66] From that total he deducted his estimate of the income an average college graduate would earn over the same period, to arrive at the additional future income he attributed to Michael's surgical training.[67] He then calculated the present value, as of the time of the trial in 1982, of that additional future income.[68] Such calculations employed assumptions about the appropriate interest rate, the inflation rate, the change in average earnings that both college graduates and surgeons would experience in the future, and the tax rates that would apply over time to both hypothetical incomes.[69] His estimate of the present value of Michael's additional future income was $472,000.[70] Goodman freely admitted that the calculations would be different with different assumptions about Michael's life expectancy or career path, and Yankwitt made no headway trying to cast doubt on Goodman's particular choices.

Yankwitt pressed Goodman on his assumption that Michael would become a surgeon, but could not show why that assumption was more problematic than any other assumption one might make about Michael's eventual specialization. But this entire exchange missed a far more fundamental problem

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same case returned to it on appeal after remand. Inman v. Inman, 648 S.W.2d 847 (Ky. 1982).

64. Sometimes the trial judge seemed to help Yankwitt out. *See* Transcript *supra* note 36, at 204-05.

65. *O'Brien*, 452 N.Y.S.2d at 806.

66. Transcript *supra* note 36, at 21-25.

67. *Id.*.

68. *Id.*

69. *O'Brien*, 452 N.Y.S.2d at 806.

70. *Id.*

with Goodman's analysis: the initial assumption that Michael's choice of specialty mattered. It did not. The reason, of course, that his future specialty was uncertain was that most all of the training he would need to qualify for it was in the future, while his filing of his divorce petition was in the past. That meant that whatever specialty credentials Michael eventually earned could not be *marital* property, even if they were property, because New York, like most states, treats assets acquired *after* the divorce action's commencement as *separate* property, not marital property.[71] As separate property, Michael's future credentials in his speciality were clearly beyond the court's allocation authority. They were Michael's alone even under Goodman's own theory.[72] So Goodman's calculations were entirely wrong even if he was right that a license or degree earned *during* the marriage was marital property. . Loretta had *no* claim on specialization credentials Michael might earn *later,* whether in surgery, internal medicine, or medical illustration. Goodman's own theory required he project the income of a physician with an M.D. degree and license to practice, but with no training or credential in any specialization at all. All the attention that courts, lawyers, and commentators gave to the speculation inherent in projecting Michael's career choices somehow missed this error in the calculations' basic premise.

D. The Trial Court Decision

Judge Daronco issued his memorandum opinion in June of 1982, six months after the trial had ended. He said the issue was "whether or not contributions to a spouse's medical education are subject to equitable distribution upon dissolution . . . ."[73] This odd construction misleadingly suggests Loretta's claim is to her financial contributions, not to Michael's license, but perhaps Daronco thought it helped to distinguish *Lesman*,

71. New York Domestic Relations Law § 236(B)(1)(c) reads: "The term 'marital property' shall mean all property acquired by either or both spouses during the marriage and before the . . . commencement of a matrimonial action . . . ." N.Y. DOM. REL. § 236(B)(1)(c). Under local practice in New York, an action is commenced by serving the divorce summons.

72. New York Domestic Relations Law §§ 236(B)(5)(b) and (c) provide that: "Separate property shall remain such" while "[m]arital property shall be distributed equitably between the parties . . . ." N.Y. DOM. REL. § 236(B)(5)(b)-(c).

73. *O'Brien*, 452. N.Y.S.2d at 802.

an Appellate Division decision, then just rendered, which rejected a wife's property claim on her husband's medical license.[74] His opinion found *Lesman* inapplicable because the *Lesman* wife had made no significant financial contributions to her husband's education. But that distinction was inconsistent with the rationale given in *Lesman* itself,[75] as well as with New York law as even Daronco described it elsewhere in his opinion.[76] Moreover, given his emphasis on the importance of Loretta's financial contributions to her claim, his factual findings of their amount were surprisingly casual, in three important respects.

The first was his finding that the value of Loretta's contributions to Michael's education was $103,390, the figure Goodman reached by applying the questionable analysis described above.[77] The second was his acceptance of Goodman's estimate of Michael's future earnings, $472,000 in 1982 dollars, as the value of the marital property share of his license, when those projected earnings assumed surgical training that was not marital property under any theory.[78] The third was his finding that Loretta contributed "76 percent of the couple's total income" over the course of their marriage.[79] One simply cannot derive this figure from the evidence presented at trial. During their marriage the couple earned $97,650 between them, of which Loretta earned $62,100, or 63.5 percent, not 76 percent. During the period in which Michael was a full time student Loretta's contributions, $53,200, were 65 percent of their total of $80,750. One can reach 75 percent by both focusing on this period of

74. *Id.* at 803.

75. *Id.* While Lesman v Lesman, 442 N.Y.S.2d 955 (Sup. Ct 1981), did mention the wife's limited role, its conclusion that the license was not property seemed grounded on its observations that it:

> is not a commodity that can be sold, nor has it value to any other person other than the holder thereof. It is an indicia of achievement and a legal authorization to practice medicine only in the State where it is granted. In and of itself it cannnot [sic] produce any income.

Id. at 957.

76. Later in his opinion Daronco correctly described the New York statute as treating an asset as marital property so long as its acquisition resulted from the "effort by *either* spouse." *O'Brien*, 452 N.Y.S.2d at 805 (emphasis added).

77. *Id.* at 806.

78. *Id.*

79. *Id.* at 803.

Michael's education, and also excluding from his contributions the tuition loans that he alone was liable to repay–an exclusion that obviously makes no sense. Despite its mysterious origin, this 76 percent figure seemed to acquire a central importance as the case was appealed, as we shall see.

Judge Daronco also found that Loretta "relinquished" the opportunity to earn her permanent teaching certificate so that Michael "could obtain his educational goals."[80] With this finding he suggests she is entitled to compensation for her sacrifice.[81] But did she make a sacrifice for Michael? It depends on her reason for not seeking the certificate: was it in fact to accommodate Michael's plans, or did she have another reason that would have led her to make the same choice no matter what Michael's plans were? Daronco's opinion does not consider the evidence that had been presented at trial on this question. That evidence suggested Michael's plans were not important to Loretta's decision. Loretta made no effort to pursue the certificate during the four years between her college graduation and her marriage, a time during which she spent more on vacations than the required courses would have cost her. Nor did she pursue it after the couple's return to New York from Mexico, despite Michael's encouragement.[82] Loretta would need the certificate to teach in the public schools (at higher pay) but not to continue teaching in the Catholic Church schools. Loretta in fact taught in Catholic schools her entire life, including after her second marriage.

On the law, Judge Daronco held that the new equitable distribution law authorized wide-ranging trial court discretion, "cast[ing] aside the traditional concepts of property in seeking equitable concepts and fairness in the multitude of variations in marital situations and the equities involved."[83] That legal conclusion made his factual findings the entire ball game, because they were the only basis upon which that discretion might be exercised. Without offering any explanation, he concluded that a "fair financial redress" for Loretta would be 40 percent of the

80. *Id.* at 802.

81. *See id.*

82. Transcript *supra* note 36, at 55.

83. O'Brien v. O'Brien, 452 N.Y.S.2d 801, 804 (Sup. Ct. 1982).

value that Goodman had placed on Michael's medical license, which came to $188,800.[84]

After reviewing this decision Michael and Andy agreed they were "in over their head" and that Michael needed another lawyer to handle his appeal.[85] Andy recommended Willard H. DaSilva, a highly regarded domestic relations specialist, a Columbia Law School graduate, and a member of the New York bar since 1949.[86] A frequent contributor to journals and books read by other domestic relations lawyers, active in several Bar Associations, a lecturer at several New York area law schools, and just chosen for the next edition of *The Best Lawyers in America*, DaSiva was a good choice.[87] He was still conducting an active practice in February, 2006, as one of only 95 attorneys nationwide invited to be a Diplomate of the American College of Family Trial Lawyers.[88] He could see that Andy Yankwitt had made a serious mistake in offering no expert of his own to counter Goodman, especially as his cross-examination of Goodman was ineffective. He set out to do the best he could, given this handicap, in getting the trial court decision reversed.

E. The Appellate Division Proceedings

DaSilva's Appellate Division brief made four main points:[89]

a. *The trial court read the statute incorrectly.* The statute gives courts the authority to make an equitable division of marital property, not a broad right to make any monetary award the court believes fair. The statute does not make formal education, or the development of the human brain generally, into property. *Lynn*, the New Jersey trial court decision to the contrary that was relied upon by Judge Daronco, was since reversed by the New Jersey Supreme Court.[90] An appropriate equitable remedy, restitution, can be ordered without distorting the statutory meaning of property.

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84. Margolick, *supra* note 15, at 34; *O'Brien*, 452 N.Y.S.2d at 806.

85. *Interview*, *supra* note 16.

86. Telephone interview with Willard H. DaSilva, (Feb. 17, 2006).

87. *Id.*

88. *Id.*

89. Brief of Petitioner-Appellant, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

90. Lynn v Lynn, NJ Super Ct, No. M - 9842 - 8, Dec. 5, 1981, *rev'd,* 453 A.2d 539 (N.J. 1982).

b. *The precedent set by the trial court's holding cannot be confined to a small group of cases.* A rule that degrees and licenses are property must logically apply to all cases, not just those in which there are no other assets. And it cannot logically be limited to medical licenses, which for this purpose cannot be distinguished from real estate licenses, liquor licenses, barbers' licenses, chauffeur licenses, or restaurant licenses.[91]

c. *The trial court offered no legal principle to guide the award's amount or explain its choice of 40 percent of the license's presumed value, which was therefore entirely arbitrary.*[92]

d. *Loretta's disappointment in the marriage's failure provided no equitable basis for the award.* Michael was also disappointed in the marriage's failure and in her refusal to engage in sexual relations and to have children, but his disappointments were improperly excluded by the trial court.[93] The court cannot assume Loretta assisted Michael in becoming a doctor given his evidence that her behavior, and their constant fighting, burdened Michael's efforts.[94]

Emanuelli's reply brief for Loretta described the case as one of many involving innocent spouses who needed protection from the overreaching behavior of exploitative spouses. The first sentence set its tone: "The case at bar presented the all too typical 'medical license syndrome' situation where shortly after the professional receives (his) license, (he) serves his spouse with a divorce summons." While adhering to Loretta's position at trial that the degree is property only when there are no other marital assets,[95] the brief effectively conceded that the trial court's holding had potentially far-reaching impact by admitting that to value a license is to value the license holder's enhanced earning capacity: "They are one and the same."[96] By this time decisions from other states rejecting Loretta's position had begun to accumulate, and in apparent response Emanuelli's brief repeatedly

91. Brief of Petitioner-Appellant at 24, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

92. *Id.* at 34.

93. *Id.* at 47, 54.

94. *Id.* at 54.

95. Reply Brief of Respondent-Appellee at 18, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

96. Brief of Respondent-Appellee at 35, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

characterizes phrases in the New York statute as "unique." Yet the brief never explained why these highlighted phrases support treatment of degrees or licenses as property, nor does it ever actually show, by comparisons to provisions in other state statutes, that New York's language is in fact different.[97] (DaSilva's reply provided interstate statutory comparisons to rebut Emanuelli's claim that New York's statute was unique.[98]) Finally, Emanuelli argued that New York's law would not permit the kind of alimony or reimbursement remedies other states employed in these cases, and that therefore the only remedy the court could provide Loretta was the property remedy she sought. The brief is often rambling and occasionally uses puzzling aphorisms such as "Valuation is neither a science nor an art."[99]

Given the disparity in the quality of their appellate briefs, one might have expected Michael to prevail, and he did. However, the appellate division decision, handed down February 11, 1985, was split. The three-judge majority held squarely that neither license nor degree is property, whether at common law or under New York's equitable distribution statute. Characterizing Loretta as relying on the "reification" of Michael's medical license to claim a percentage of his future earning potential, they found nothing in the Equitable Distribution Law or its legislative history to suggest the legislature's intention "to vest a proprietary right in one spouse in the other spouse's very person."[100] If the legislature really meant to adopt Loretta's "novel" and "*sui generis*" view of marital property, it would have used statutory language that made this clear,[101] but the statutory language does not support this view, explicitly or implicitly.[102] The statute's provision for distributing cash in lieu of a "burdensome" or unlawful property share in "a business, corporation, or

97. For example, the brief argues that New York "has been careful to avoid the vagueness and lack of specificity which has plagued other jurisdictions and led to their inability to adequately deal with the professional license syndrome on a present value basis.", *Id.* at 30. No specific comparison of statutory language across states is offered to explain or support this point.

98. Michael's reply brief on appeal at 3-4.

99. *Id.* at 33.

100. O'Brien v. O'Brien, 485 N.Y.S.2d 548, 550 (App. Div. 1985).

101. *Id.* at 551.

102. *Id.*

profession" has no contrary implication because the context makes clear it applies to a profession established during the marriage, which would be marital property under conventional understandings.[103] The provision thus had an important function without stretching its meaning to apply where "there is no marital property to distribute."[104]

The majority agreed Loretta might have been treated badly, if Michael indeed walked out on her after accepting her support for his education. But earlier appellate division cases had held marital fault (apart from "egregious" misconduct) irrelevant to property allocation, precluding reliance on this possible wrong to justify the trial court's award.[105] This analysis was astute, and especially relevant because the Court of Appeals later relied on this same no-fault principle to affirm the trial court's exclusion of Michael's proffered evidence that Loretta had refused sexual relations throughout their marriage.[106] One cannot rely on no-fault rules to bar Michael from explaining why he left the marriage, but then consider him at fault for having left. But such an improper assumption of Michael's fault was implicit in Emanuelli's characterization of the case as an example of "medical license syndrome." If blame for ending the marriage were to be considered, then Michael's evidence had to be allowed. New York is in fact in line with the law of most states in generally barring consideration of fault in marital property allocations, and there are very good reasons for the position it takes. But that New York rule meant that the court could not justify a property award to Loretta with the assumption that Michael was to blame for the marriage's end.

Finally, the majority suggested that on remand the trial court do equity by making two distinct maintenance awards to

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103. IRA MARK ELLMAN ET AL, FAMILY LAW: CASES, TEXT, PROBLEMS 298-315, 324-62 (4th ed. 2005).

104. *O'Brien,* 485 N.Y.S.2d at 554.

105. *Id.* at 552.

106 [Michael] contends that the trial court erred in excluding evidence of defendant's marital fault on the question of equitable distribution . . . . Except in egregious cases which shock the conscience of the court, however, it is not a 'just and proper' factor for consideration in the equitable distribution of marital property . . . . We have no occasion to consider [Loretta's] fault . . . because there is no suggestion that she was guilty of fault sufficient to shock the conscience.

O'Brien v. O'Brien, 489 N.E.2d 712, 719 (N.Y. 1985).

Loretta.[107] First, an ordinary maintenance award sufficient to "sustain" the "advanced life-style" she might have had as Michael's wife, to continue "for a reasonable time."[108] This traditional award would end if Loretta remarried. But the majority suggested the trial court also "fashion a rehabilitative award . . . [to] cover all reasonable costs of her [Loretta's] post-graduate studies leading towards a permanent teacher's certificate" and provided that this award should be paid even if Loretta remarried.[109]

The two-judge dissent read New York's statute more creatively. Refusing to be bound by the statute's actual language, they would have held that:

> the concept of 'marital property' is a purely statutory creation which must be used to accomplish what is fair and just in dividing the attainments of the marriage, material or otherwise . . . . In seeking to do equity it is unnecessary and unrealistic to rely solely upon prior conventional concepts of property.[110]

This view echoed the suggestion of the trial court opinion that New York had not changed its marital property rules so much as replaced them altogether with a judicial authority to make equitable rearrangements of the divorcing parties' finances.[111] Though without much textual authority, this construction of the statute provided a convenient basis for rendering irrelevant the mounting number of sister-state decisions rejecting claims like Loretta's.

E. The New York Court of Appeals Proceedings

Emanuelli, now in the appellant role, was more focused in his Court of Appeals brief. He pointed out that Goodman was the only expert to testify. He said that Michael's claim that he was inclined to pursue internal medicine rather than surgery was a "sham." But the heart of his argument echoed the Appellate Division dissent: because the concept of marital property was foreign to the common law, and entirely a creature of stat-

107. *O'Brien*, 485 N.Y.S.2d at 554-55.
108. *Id.* at 555.
109. *Id.*
110. *Id.* at 558 (Thompson, J. dissenting).
111. *Id.*

ute, general arguments about the nature of property were irrelevant. A "narrow" definition of property would "arbitrarily handcuff" the court in exercising its equitable authority to distribute property "acquired during the marriage."[112] Arguing again that the New York statute was unique, he quoted its list of factors to consider in allocating marital property as if the list were special,[113] and characterized New York's provision for "distributive awards" as "ingenious" and unique.[114] Yet anyone familiar with the field knew that New York's list of factors was entirely typical of equitable distribution statutes nationwide and that "distributive award" was simply New York's odd label for a commonplace legal concept: *Every* state recognizes that some divorces involve marital or community assets that are impractical or inadvisable to divide, so that an equitable or equal division requires an order requiring the spouse receiving the asset to make cash payments, in single lump sum or installments, to the other spouse.[115] Such arrangements are especially common when a business managed by one spouse is the parties' largest marital or community asset–precisely the case that the Appellate Division suggested was the typical use intended for the distributive award.[116]

It is quite possible Emanuelli did not really understand just how ordinary New York's rules were. Perhaps, like many New York lawyers, his only frame of reference against which to view New York's new law was New York's old law. The new law was indeed revolutionary when compared to the old law it replaced, even if unremarkable when compared to the law of the 47 other states that had earlier adopted either equitable distribution, or community property.[117] If Emanuelli was unaware of the national context, he was in good company. New York's courts and

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112. *Id.* at 10.

113. *Id.* at 14.

114. *Id.* at 16-17.

115. IRA MARK ELLMAN ET AL, FAMILY LAW: CASES, TEXT, PROBLEMS (4th ed. 2005).

116. *See* O'Brien v. O'Brien, 485 N.Y.S.2d 548, 555 (App. Div. 1985).

117. An example of the timidity of New York's laws is a provision that treats the appreciation of separate property, during marriage, as marital property "to the extent that such appreciation is due in part to the contributions or efforts of the other spouse." N.Y. DOM. REL. § 236(B)(d)(3). New Yorkers may see this as an expansive provision, extending the reach of marital property. But, in fact, most states treat the fruits of either spouse's labor during marriage as community or

commentators have historically been provincial in their discussions of family law issues. The best-known commentators on New York family law during this era were Foster and Freed, who were involved in drafting New York's equitable distribution reforms. But the contemporaneous edition of their treatise sounds like Emanuelli's brief. "The Equitable Distribution Law is a unique and perhaps esoteric statute tailor made for New York and the device of the distributive award was invented for New Yorkers."[118] To say New York's law is unique in providing for "distributive awards" is like saying it is unique in providing for a Court of Appeals. New York's idiosyncratic choice of name is unique, but the idea for which it stands is commonplace.

One might therefore see DaSilva's core task, as the *O'Brien* came before the New York Court of Appeals, as persuading that court that the case presented no special "New York" angle. His brief made clear why differences in terminology did not change the fact that claims like Loretta's had been rejected in substance by all the other states that had considered them. His brief also laid out the conceptual difficulties of restricting a claim like Loretta's to cases in which there are no other assets (which Emanuelli's briefs suggested) or to cases involving professional licenses and degrees.[119] The judicial inability to restrict the precedent in this way meant, DaSilva sought to show the court, that widespread havoc would necessarily follow from a decision favoring Loretta's property claim. He also challenged both the long-term maintenance award that the Appellate Division allowed in lieu of the property claim it rejected, the lower courts' exclusion of Michael's evidence of Loretta's fault, and the absence of any basis for the trial court's award to Loretta of 40 percent of the degree's purported value, rather than any other percentage the court might have arbitrarily chosen.

DaSilva felt confident going into the oral argument, and not only because he believed the law favored his position. He as-

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marital property, a significant difference. *See* A.L.I. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.05(1) cmt. b (2000).

118. The text continues: "This means decisions from other states . . . which have substantially different statutes . . . are irrelevant . . . ." Henry H. Foster, Jr., Doris J. Freed, & Joel R. Brandes, *Law and the Family*, N.Y. Equitable Distribution Law, 666-67 (2d Ed. Lawyers Cooperative 1986).

119. Reply Brief of Petitioner-Appellant, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (App. Div. 1985).

sumed Loretta would be allowed either a generous maintenance award, or a property share in his medical license, but believed he would obtain an acceptable result for Michael either way. He knew Loretta had secretly remarried, which meant that any maintenance award allowed by the Court of Appeals would end before it began.[120] And if the Court instead allowed the property claim, DaSilva planned to renew a settlement offer Emanuelli had rejected three times before–before and after the trial court decision, and after the decision in the Appellate Division.[121] He was confident, however, that this time Emanuelli would accept it, a point to which we shall return.

O'Brien v. O'Brien was argued before the New York Court of Appeals on November 11, 1985. The court has seven judges. The Chief Judge, Sol Wachtler, had been elected to the court in 1972, under a system of partisan elections that New York later abandoned. He was appointed Chief Judge by Governor Cuomo on January 2, 1985, only 10 months before the argument. Well-regarded at the time, his career came to a surprising and humiliating end in 1992 with his conviction and imprisonment for harassing both the socialite Republican fund-raiser who had ended her affair with him, and her teenage daughter.[122] But in 1985 his fall from grace was still years away. Within a few months Cuomo had two more appointments, Fritz Alexander and Vito Titone. Only two years before Cuomo had appointed Richard Simons and Judith Kaye, the first woman ever to serve on the New York Court of Appeals. (Kaye was later to serve as New York's first woman Chief Judge.) Of the seven judges, then, only two were not recent Cuomo appointees. Mathew Jasen had been elected to the court in 1967, and retired a month after *O'Brien* was decided. Bernard Meyer was appointed by Governor Hugh Carey in 1979 and would retire in 1986, the year after the *O'Brien* decision.

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120. "[A]n award of maintenance shall terminate upon . . . the recipient's valid or invalid marriage." N.Y. DOM. REL. § 236(B)(6)(c).

121. Telephone interview with Willard H. DaSilva, (Feb. 17, 2006).

122. Wachtler later claimed his problems arose from manic-depressive disorder for which he had refused treatment despite his wife's pleas. *See, e.g., Judge Not: Fall from Honor. How Sol Watchler went from Esteemed Chief Judge of New York to Shamed Prison Inmate,* PSYCHOLOGY TODAY, July-August 1997, *available at* http://psychologytoday.com/articles/pto-19970701-000027.html. He also wrote a memoir of his 13 months of prison life, entitled, *After the Madness.*

DaSilva later recalled that the prevailing view at the time was that the property allocation reforms were coupled with a change in the law of alimony–that along with the renaming of alimony as maintenance was the intention to eliminate long-term alimony awards.[123] The idea was that new property awards would eliminate the need for alimony in most cases because they would be sufficient at least to provide transitional assistance, which was all a newly divorced wife would need in the new world of gender equality.[124] In that way, a "clean break" between the divorcing parties could be achieved. Emanuelli in fact offered this argument in his brief, claiming the property remedy was necessary because maintenance (formerly called alimony), was now for limited time periods only.[125] One who did not know of Loretta's secret remarriage might have wondered why her lawyer was making an argument against the generous maintenance award that the Appellate Division had directed in her favor. But the argument may have been the most important that Emanuelli made. It did not matter that other states had by this time already begun to realize that the goal of "clean break" was unrealistic. A clean break could never be achieved where there were minor children, and even where there were not, it became increasingly clear that long-term alimony would still be appropriate at the dissolution of many long marriages, at least.[126] But here as elsewhere, New York's transition lagged behind. While the Court of Appeals did not rule explicitly that long-term maintenance awards were barred, it did indicate its understanding that the New York reforms were motivated in part by such a "clean break" philosophy.[127] That meant that if the court wanted to do something for Loretta, it needed to find a property remedy for her.

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123. Telephone interview with Willard H. DaSilva, (Feb. 17, 2006).

124. *Id.*

125. Brief of Respondent-Appellee at 11, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

126. A well-known early case coming to this conclusion was *In re* Marriage of Morrison, 573 P.2d 41 (Cal. 1978).

127. The majority wrote:

> [I]mplicit in the statutory scheme . . . is the view that upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the

Events outside the courtroom might have motivated the court to find a remedy. In addition to the parties' briefs, an amicus brief was filed in the Court of Appeals by Sally Weinreb, on behalf of the Westchester Women's Bar Association. Although it did not appear to have much substantive impact, it did reflect a political reality: Loretta's claim, publicized at the time in the local media, had begun to take on the attributes of a *cause celebre* for individuals and groups who believed women were not treated fairly in the divorce process. Loretta had published a column in the Ladies' Home Journal following her trial court victory. Entitled *It's Not Easy to Be a Woman Today*, it featured a headline blurb quoting Loretta: "I am not the first wife who sacrificed to put her husband through school only to lose him to another woman. But in my case, a judge decided that I deserved a share in my husband's future."[128] Local news media covered the case as it made its way from the trial court up to the Court of Appeals, and the coverage did not always portray Michael favorably. People made comments to him in the bank, at the grocery store, telling him he had abused his wife.[129] One Sunday his second wife, Patti, returned from Mass to report that the priest's sermon, about people's obligations to one another, had used the newspaper account of Michael's divorce for an example of a husband who sought to avoid his family obligations.[130] Michael stormed over to the church to challenge the surprised priest, who had no idea this famous abusing husband was in his congregation.[131]

It would not be surprising if the charged public attention the *O'Brien* case received affected the court's deliberations. Loretta became for many a symbol of the loyal, supportive wife who was exploited and then cast aside in the modern era of high divorce rates. DaSilva later recalled that Judith Kaye led the onslaught at oral argument for the trial court's position. At one

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marriage was over, was replaced with the concept of maintenance which seeks to allow the recipient spouse an opportunity to achieve economic independence.

O'Brien v. O'Brien, 489 N.E.2d 712, 716 (N.Y. 1985) (citations omitted).

128. Loretta O'Brien, *It's Not Easy to Be a Woman Today*, LADIES' HOME JOURNAL, Nov. 1982 at 40.

129. *Interview*, *supra* note 16.

130. *Id.*

131. *Id.*

point Kaye and Meyers argued with one another while the lawyers watched. When DaSilva left the courtroom, he felt that it would be a 4-3 decision, but he was not sure which way it would go. In fact, the court ruled unanimously for Loretta, although Meyers wrote a concurrence that focused on reasons why the ruling was likely to be problematic. DaSilva later had a chance to ask Meyers why he hadn't labeled his opinion a dissent. Meyers told him "you have to understand the politics."[132] He also said it seemed important to present the case as unanimous even if it really was not. Meyers told DaSilva that Kaye had argued strongly for her position within the court, that she was very persuasive, but that also "arms were twisted."

Kaye, however, did not write the court's opinion. Wachtler assigned it instead to Richard Simons. One might not have thought this assignment augured well for Loretta. As an appellate division judge in 1978, Simons had written the last important decision under New York's old marital property law. *Saff v. Saff,* was decided in 1978, only two years before the legislative reform.[133] The question in *Saff* was whether New York's courts could use the constructive trust doctrine in applying the common law title system, as many other common law courts had done.[134] The facts were certainly appealing. The Saffs had married in 1936 when they both were poor.[135] Over the next ten years Mrs. Saff held a series of jobs as a maid and factory worker to help keep them afloat.[136] All their funds were held in a joint account, and in 1946 Mr. Saff used them to start a steel company with a partner.[137] While the men concentrated on selling, Mrs. Saff ran the company office, doing everything from dealing with creditors to painting steel beams too big to fit in their garage.[138] She also handled the Saff's personal finances and was the primary caretaker of their two adopted children, one of whom contracted polio and required constant care.[139]

132. Telephone interview with Willard H. DaSilva, (Feb. 17, 2006).

133. Saff v. Saff, 402 N.Y.S.2d 690 (App. Div. 1978), *appeal dismissed*, 389 N.E.2d 142 (N.Y. 1979).

134. *Id.* at 691-92.

135. *Id.* at 692.

136. *Id.*

137. *Id.*

138. *Id.* at 693.

139. *Id.* at 697 (Cardamone, J., dissenting).

The steel company proved successful, and Mrs. Saff remained the company bookkeeper even when the Saffs separated after nearly 40 years of marriage.[140] She sought a share of the company assets, but they were largely held in Mr. Saff's name.[141] She claimed that their history together implied his promise to share them.[142] Writing for the majority in a split decision of the Appellate Division, Judge Simons affirmed the trial court decision denying her claim:

> [P]romises going to the marriage relationship and those going to a business relationship . . . . may not be mixed together in some sort of salmagundi . . . to find an implied promise that the wife will share in the ownership of a specific business because of such unrelated acts as her employment as a maid or drill press operator, her care of the children or her handling of the family finances. The remedy of constructive trust may not be applied randomly to adjust general equities between spouses . . . . [¶] Appellant's participation in the business is easily explainable as a normal incident of marriage . . . without any expectation on her part of any future ownership of the business. [¶] . . . This case is a vivid illustration of the dangers of creating a judicial version of a community property law.[143]

Mrs. Staff's appeal from his decision was dismissed by the Court of Appeals in 1979.[144] In 1983 Simons was elevated to the Court of Appeals, and in 1985 wrote the court's opinion in *O'Brien*.[145]

His statement of the *O'Brien* facts accepted the trial court's factual findings: Loretta had relinquished her opportunity to obtain her permanent teacher's certificate to allow Michael to pursue his education; had supported the parties while Michael "pursued his studies," and had provided 76 percent of the parties' income during the marriage, "exclusive of a $10,000 loan obtained" by Michael.[146] He told the reader that Michael had commenced the divorce action as soon as he received his medical license, obliquely suggesting the same image of exploitation

140. *Id.* at 694.
141. *Id.* at 693.
142. *Id.*
143. *Id.* at 693-94.
144. Saff v. Saff, 389 N.E.2d 142 (N.Y. 1979).
145. *See* O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).
146. *Id.* at 714.

that Emanuelli had urged with his diagnosis of "medical license syndrome."[147] He dismissed Michael's citation of "similar cases from other jurisdictions" because "the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law."[148] He italicized for emphasis the words of the New York statute that made clear its courts could distribute marital property between the spouses *"regardless of the form in which title is held"*–perhaps a shock for the author of *Saff*, but the longstanding rule in most of the rest of the country.[149] Citing the New York-centric analysis of Foster and Freed, and excited comments from a local bar journal that found the new statute revolutionary, the opinion bought–or sold itself–Emanuelli's "New York uniqueness" argument hook, line, and sinker.[150]

New York judges do seem to assume that little can be learned from the law of other states, and Simons' wonderment at the changes that equitable distribution reforms had made, in the old property law he knew so well, seemed only to exacerbate this tendency. For Simons, and the New Yorkers whose writings he quoted, a statute that made title no longer determinative could not really be a property system at all.[151] By enacting such radical and unprecedented rules the legislature *must* have meant to replace property law, not merely to reform it. And if justice for wives was this reform's impetus, then equity, as seen through judicial eyes, must be the replacement they intended. Simons had traveled entirely across the doctrinal world, moving from *Saff's* endorsement of strict and mechanical property rules, with no room for judicial discretion, to *O'Brien*'s endorsement of unrestrained discretion, with no rules at all. The new marital property statutes, in New York as elsewhere, did not create the "salmagundi" Simons feared in *Saff*.[152] No other

147. *Id.*

148. *Id.* at 715.

149. *Id.*

150. *See id.*

151. *Id.*

152. Saff v. Saff, 402 N.Y.S.2d 690, 693 (App. Div. 1978), *appeal dismissed*, 389 N.E.2d 142 (N.Y. 1979). " Salmagundi" is defined in dictinary.com as a "salad of chopped meat, anchovies, eggs, and onions, often arranged in rows on lettuce and served with vinegar and oil" or, more generally, "a mixture or assortment; a potpourri."

state had concluded that one had to abandon all normal property law principles to recognize the wife's interest in property acquired during marriage through her husband's labors.

F. The Aftermath of O'Brien.

As DaSilva warned in his brief, *O'Brien* wreaked havoc with the New York law.[153] Struggling with the precedent, New York's lower courts realized early on that there was no basis for distinguishing a husband's medical license from advances in a wife's acting career or a husband's successful completion of civil service examinations for police lieutenant.[154] Yet if every advance during marriage in a spouse's earning capacity constitutes marital property, then great injustices will often result if marital property is simply divided equally at divorce. So *O'Brien* has made it impossible for New York to follow the national trend toward divorce law that presumes marital property be divided equally. The division of marital property in New York must instead involve time-consuming and expensive inquiries into the conduct of the parties' marriage. New York courts have held, for example, that a wife had no claim to the enhanced earning capacity resulting from her husband having passed his actuary examinations because the husband had performed most household duties and the wife did not contribute to his success.[155]

DaSilva recently described the legal climate created by O'Brien as "a nightmare."[156] The rule of *O'Brien* often seems to require nonsensical results, such as giving a high-earning husband a share in the added earning capacity enjoyed from the teaching certificate acquired during marriage by his lower-earning wife. Avoiding such absurdities requires New York courts to manufacture reasons why such a spouse should receive a very low percentage of the degree's or certificate's value.

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153. Brief of Petitioner-Appellant, O'Brien v. O'Brien, 485 N.Y.S.2d 548 (App. Div. 1985).

154. Golub v. Golub, 527 N.Y.S.2d 946 (Sup. Ct. 1988) (acting); *see also* Elkus v. Elkus, 572 N.Y.S.2d 901 (App. Div. 1991) (husband's claim to wife's successful career as an opera singer); Allocco v. Allocco, 578 N.Y.S.2d 995 (Sup. Ct. 1991) (civil service examinations).

155. McAlpine v. McAlpine, 574 N.Y.S.2d 385 (App. Div. 1991).

156. Telephone interview with Willard H. DaSilva, (Feb. 17, 2006).

In one case the court explained that even though the husband provided all the wife's financial support during her education, and gave her personal assistance with her studies, the certificate was primarily the result of her own abilities and efforts;[157] a point that of course could just as well be made in *O'Brien,* and sometimes has been made in similar cases decided since.[158] The consequence is that marital property awards in New York are entirely unpredictable.

O'Brien made it impossible for New York to follow the national trend toward divorce rules that presumes marital property be divided equally. The division of marital property in New York instead involves time-consuming and expensive inquiries into the conduct of the parties' marriage. These concerns loomed large in the rejection of *O'Brien* by the American Law Institute in its comprehensive analysis of family dissolution law, released in 2000. As the A.L.I. explained, the real policy question is how to identify the cases in which a person should have a claim on the income their former spouse earns after their marriage has ended. The A.L.I. concluded that marital duration provided a better indicator of the equity of such claims than the happenstance that a degree or other credential was earned during the relationship, which might have been long or short. It therefore chose to provide for such duration-based claims in a revitalized and regularized system of alimony (recast as "compensatory payments), rather than through the property system.[159]

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157. *E.g.*, Brough v. Brough, 727 N.Y.S.2d 555 (App. Div. 2001) (offering this explanation in granting the husband only 10 percent of the wife's enhanced earnings arising from the B.A., M.A., and teacher's certificate she earned during their 20-year marriage); Gandhi v. Gandhi, 724 N.Y.S.2d 541 (App. Div. 2001) (stating that neither the husband's accounting degree, earned partially before marriage, nor the wife's paralegal degree, earned partially after the marriage, should be allocated because the husband's CPA license was attributable in part to his intelligence and hard work).

158. Conasanti v. Conasanti, 744 N.Y.S.2d 614 (App. Div. 2002). *Conasanti* granted the wife only 30 percent of the husband's medical degree, because "although [the wife's] efforts certainly contributed to the ability of [the husband] to obtain his medical license and advanced degrees, those achievements were accomplished primarily through [his] own ability and herculean effort as well as his own capacity for hard work." *Id.* (citations omitted).

159. American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.07, Comment *a* (2000).

Although *O'Brien* has been rejected by every other state high court to consider the matter, the New York Court of Appeals has held firm, even overruling lower court decisions attempting to ameliorate *O'Brien*'s consequences.[160] In 1995 the New York State Bar Association unsuccessfully urged the legislature to overrule *O'Brien*.[161] Judith Kaye, the only member of the *O'Brien* majority remaining on the Court of Appeals, and now its Chief Judge, appointed a commission in 2004 "to examine every facet of the divorce and custody . . . process and recommend reforms to reduce trauma, delay and cost to parents and children . . . ."[162] Although the Commission's charge was to focus on procedural reforms, the majority could not restrain itself from making a single substantive recommendation in its 2006 report: overrule *O'Brien*.[163]

The Court of Appeals decision probably had less impact on Michael and Loretta than it had on New York law. The Court issued its opinion the day after Christmas in 1985, almost exactly five years to the day after Michael's original summons had been served. Michael, still then a medical resident, learned of

160. The court reaffirmed and actually expanded *O'Brien* in McSparron v. McSparron, 662 N.E.2d 745 (N.Y. 1995). Lower New York courts had declined to apply *O'Brien* to a degree held by a spouse who had subsequently established a successful professional practice that was also subject to division, finding that in such cases the degree or license had "merged" into the practice and need not be divided separately from it. Many expected that *McSparron*, in reviewing these cases, would overrule *O'Brien*, but instead it disapproved the lower court decisions and suggested that ensuring the separate treatment of the license as marital property is necessary in order to avoid introducing "nettlesome legal fictions" in the law. *McSparron's* discussion of *O'Brien* does not acknowledge its unanimous rejection by other state high courts. In Grunfeld v Grunfeld, 731 N.E.2d 142 (N.Y. 2000), the court did instruct lower courts to avoid the double-counting that would result from basing a property award of a share in a degree, and a maintenance award, on the same post-divorce income, but it reaffirmed *O'Brien*, again to the surprise of many.

161. N.Y. ST. B. ASS'N, REPORT OF THE TASK FORCE ON FAMILY LAW 15 (Aug. 19, 1996); Spencer, *No-Fault Divorce Endorsed By State Bar, Uphill Battle Predicted for State Legislature*, N.Y.L.J., Jan. 27, 1997, at 1.

162. MATRIMONIAL COMMISSION, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), http://www.courts.state.ny.us/reports/matrimonialcommission report.pdf; reprinted here as Appendix A.

163. "Consistent with the Commission's mandate to reduce the cost and length of matrimonial proceedings and to increase the public's confidence in the fairness and rationality of the awards rendered by the courts, the Commission recommends that legislation be adopted that eliminates a party's 'enhanced earning capacity' as a marital asset." *Id.* at 66.

the decision on his way to work.[164] He felt devastated, but his family, parents and four siblings were very supportive.[165] Work was a distraction and he turned down his senior's offer to give him some time off.[166] Not surprisingly, the other doctors were also supportive. It was nonetheless often difficult because the publicity meant that everyone knew who he was. In the end, however, Michael never had to pay Loretta the $188,000 that Daronco had ordered. Still in training, Michael's income was not high, and he had credit card debts as well as education loans to repay. The judgment far exceeded his assets. Emanuelli initially turned down DaSilva's renewed settlement offer, for a lesser amount more plausibly within Michael's financial capacity. He thought DaSilva crazy to repeat, after his Court of Appeals loss, an offer Emanuelli had rejected three times before. But DaSilva explained that if the judgment stood, Michael would have no choice but to declare bankruptcy, which could wipe the judgment out.[167] Loretta then accepted the settlement offer, but on the condition that its terms never be made public.

Michael was comfortable with the settlement; he recalled years later that he had felt Loretta deserved something, and was even prepared to take out a loan to give her "a chunk of money," but not the amount she claimed.[168] While the payments called for in the original judgment were more than he earned, the settlement "was a little better," and he complied fully with its terms even though the financial burden was "considerable," especially at the beginning when he worked additional hours as a resident to pay it, taking time away from his new family.[169] He began payments in 1986, and paid it off a year early in 1999, "just to get rid of it."[170]

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164. *Interview*, supra note 16.

165. *Id.*

166. *Id.*

167. *Id.* It is not clear whether Michael could avoid the judgment under current bankruptcy law.

168. *Id.*

169. The original decree did provide for annual payments that were lower at first to take account of the lower income he was initially expected to make, although the required amount reached $10,000 in 1986, the year after the Court of Appeals decision in *O'Brien*, escalating to $35,000 by 1989. O'Brien v. O'Brien, 452 N.Y.S.2d 801, 806 (Sup. Ct. 1982).

170. *Interview*, *supra* note 16.

Just as he suggested at trial, Michael never became a surgeon. He chose instead a residency in emergency medicine. He recently recalled that emergency medicine was then a new field, and residencies were hard to get in to.[171] He had an extra hurdle because he was foreign trained. He had to prove himself, and he did. In 2006 Michael was still working as an emergency room physician, in upstate New York. Even today, people at the hospital sometimes ask him if he is *the* Dr. O'Brien.

Michael also sought an annulment of his marriage in the Church tribunals, a step that was important to him as a Catholic. Michael recalled that Loretta resented the annulment.[172] A priest told him Loretta thought the marriage should have lasted and that she had paid Michael's way.[173] He told the priest that he had his facts wrong and stormed out, but learned a few weeks later that the annulment was granted on grounds of immaturity at the time the marriage had been entered into.[174] Patty also obtained an annulment of her first marriage, and Michael and Patty were married in a church wedding on Saint Patrick's Day in 1985, before Michael's case was argued in the Court of Appeals.[175] Michael and Patty ultimately had two children, and were still together in 2006.

Loretta died in November, 2002, survived by her second husband, James Lynch, and their child Jaime. The obituary described her as a life-long resident of Yonkers, where she apparently lived with her second husband till her death.[176] It seems that Loretta never did seek the higher pay available by teaching in public school; her obituary describes her as having "first taught Kindergarten at St. Peter's School in Yonkers and then at St. Dominic School in the Bronx."[177] Friends were urged, in lieu of flowers, to contribute to the scholarship fund the school set up in her name.[178]

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. The Obituary was published in the local newspaper, the Journal News, on November 6th, 2002.
177. *Id.*
178. *Id.*